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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA for)
the use of POONG LIM/PERT)
JOINT VENTURE,)

Plaintiff,)

vs.)

DICK PACIFIC/GHEMM JOINT)
VENTURE, CONTINENTAL CASUALTY)
COMPANY, NATIONAL FIRE)
INSURANCE COMPANY OF HARTFORD,)
SEABOARD SURETY COMPANY, and)
ST. PAUL FIRE AND MARINE)
INSURANCE COMPANY,)

Defendants.)

Case No. 3:03-cv-290-JWS

PLAINTIFF'S MOTION AND
MEMORANDUM FOR
RECONSIDERATION
RE: SEJIN LABOR HOURS

DOCKET NO. 157

Poong Lim respectfully moves the Court to reconsider its Order of March 2, 2006, granting DPG summary Judgment. This motion is brought pursuant to D. Ak. LR 59.1. The basis for this motion is that it appears the Court did not consider material facts and propositions of law which when viewed together preclude summary judgment.

1 In the March 2, 2006, Order, the Court granted summary
2 judgment to DPG with respect to Poong Lim's claim for additional
3 compensation owed to its subcontractor, Sejin. The Court's
4 ruling relied upon the holding in *University of Alaska v. Modern*
5 *Construction, Inc.*¹ In its Order, however, the Court did not
6 address the issue of whether or not Poong Lim could claim the
7 debt owed to Sejin under the theory of *quantum meruit* as an
8 element of its own damages. The *Modern* Court did not address
9 the issue and that court did not foreclose the possibility.

10 It is well settled in Alaska that contract damages for
11 breach of contract include losses which are "foreseeable as a
12 probable result of a breach. . . ." *Native Alaskan Reclamation*
13 *and Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211,
14 1219-20 (Alaska 1984), *citing* Restatement (Second) of Contracts
15 § 351 comment a, at 135-6 (1981) of C. While Alaska law does
16 not permit recovery of damages which are speculative,² where the
17 complaining party can show actual likelihood of liability they
18 may be permitted recovery for that liability. *Id.* Under the
19 theory of *quantum meruit*, Poong Lim is entitled to present
20 evidence showing the cost of performing its changed obligations.

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24 ¹ 522 P.2d 1132 (Alaska 1974); *Order* at 3.

25 ² *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 799 (Alaska 1978).

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1 The contractual and equitable obligation to Sejin is an element
2 of that cost.

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4 In *quantum meruit* the party's recovery is the reasonable
5 value of the goods or services rendered or work performed. See,
6 e.g., *Fairbanks North Star Borough v. Tundra Tours, Inc.*, 719
7 P.2d 1020, 1029 (Alaska 1986). The reasonable value of the work
8 performed is generally admissible and can include evidence of
9 the actual costs of performance:

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11 The majority rule in quantum meruit recovery
12 is that absent an agreement fixing
13 compensation, *any evidence tending to show*
14 *the reasonable value of services is*
15 *generally admissible.*

16 *Id.* at 1029-30 (additional citations omitted) (emphasis added).
17 Under *Tundra Tours* and *Native Alaskan Reclamation* Poong Lim is
18 entitled to present evidence supporting the obligation it
19 incurred to Sejin in meeting its changed obligations as an
20 element of its own damages under its quantum meruit theory.

21 In the present case, evidence submitted to the Court
22 demonstrates that Poong Lim is liable to Sejin for extra work by
23 contract and under the theory of *quantum meruit*. The unrebutted
24 testimony from Mr. Young Shin Kim, Sejin's president,

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1 established the fact that not only did Sejin expend the extra
2 hours of labor, but also that Sejin fully expected to be
3 reimbursed for the value of its work and that there was an
4 agreement to pay Sejin. See Docket No. 182, Opposition to
5 Motion for Summary Judgment Seeking Dismissal of Poong Lim's
6 Claims for Shop Drawing/Detailing Hours at 6-7. The unrebutted
7 testimony from Mr. J. H. Lee of Poong Lim acknowledges that
8 Poong Lim received the benefit of Sejin's services and issued
9 change orders for the additional work. See Docket 182 at 4-5.
10 These change orders represent *Poong Lim's* contractual
11 liabilities to Sejin which raise material issues of fact which
12 preclude summary judgment. Moreover, the amount Poong Lim owed
13 Sejin for those changes and the percentage of that work
14 attributable to DPG's breach which Poong Lim Seeks in this suit,
15 was in fact calculated by Poong Lim's expert, Jordan Rosenfeld.
16 There is no question that Poong Lim has both an equitable and
17 contractual obligation to repay Sejin for the additional time,
18 effort, and expense it incurred on Poong Lim's behalf.

19 DPG's breaches of contract forced Poong Lim, and by
20 extension its subcontractor Sejin, to expend additional time,
21 manpower, and money to meet DPG's demands. The fact that Poong
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1 Lim would necessarily incur liability for additional expense,
2 either contractual (in the case of a pass-through agreement and
3 change orders) or equitable (by having received the benefit of
4 its subcontractor's work), in the form of shop drawing labor
5 from its subcontractor Sejin was a foreseeable consequence of
6 DPG's breach. The fact that Poong Lim has not yet paid Sejin
7 and that the agreement with Sejin regarding payment is not in
8 writing does not extinguish either Poong Lim's equitable or
9 contractual liability. Under *Native Alaskan Pest Control* the
10 foreseeability of this liability makes it a recoverable element
11 of Poong Lim's damages under *quantum meruit*. Otherwise Poong
12 Lim is put in the position where it will have to pay foreseeable
13 damages arising out of DPG's breaches of contract (in the case
14 of Sejin costs) and not be able to recover them from the party
15 causing the damage.
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1 Dated: March 9, 2006

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18 P-CBB 132 MOT reconsideration re Sejin 030906

19 CERTIFICATE OF SERVICE

20 I hereby certify that on this 9th day of
21 March, 2006, a true and correct copy of
22 the foregoing was served electronically
23 on:

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